



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.407 OF 2018

Bharat Krushna Padvi,
Age 21 yrs., Occ. Agri.,
R/o Thuvanicha Patilpada,
Tq. Dhadgaon, Dist. Nandurbar.

... Appellant

... Versus ...

The State of Maharashtra

... Respondent

...

Mr. Joydeep Chatterji, Advocate for appellant

Mr. S.D. Ghayal, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI &
ABHAY S. WAGHWASE, JJ.

RESERVED ON : 30th NOVEMBER, 2023

PRONOUNCED ON : 08th DECEMBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused challenging his conviction in Sessions Case No.18/2016 by learned Additional Sessions Judge, Shahada, Dist. Nandurbar on 11.06.2018, whereby the appellant has

been held guilty of committing offence punishable under Section 302 and 323 of the Indian Penal Code, 1860.

2 The prosecution has come with a case that deceased Sukalal Shila Padvi, R/o Thuvani was the husband of informant PW 3 Vilabai. PW 3 Vilabai was working as Anganwadi Helper. Accused is son of one Rajubai Krushna Padvi, who was also working as Anganwadi Sevika. Informant Vilabai lodged report with Dhadgaon Police Station on 18.12.2015 stating that Sukalal had gone to his cousin sister's house at village Keli around 9.30 a.m. on 17.12.2015. Name of his cousin sister is Chinkibai Lalsingh Padvi. Around 4.00 p.m. Chinkibai came running to the house of Vilabai stating that when Sukalal was sleeping in her house, Bharat Krushna Padvi i.e. appellant has assaulted Sukalal with the help of one wooden dengara (a heavy bottomed wooden article like plank). Sukalal has sustained bleeding injury. Accused has also assaulted Sukalal's brother Rakesh with fists and Rakesh is present at the house of Chinkibai. Thereafter, Vilabai along with her father-in-law and others went to the house of Chinkibai. They all saw Sukalal lying on the ground, blood was oozing out of his nose and ears. He was then taken to Government Hospital, Dhadgaon, where he was declared dead. Thereafter Vilabai went to Police Station and lodged the First Information Report.

3 On the basis of said First Information Report offence under

Section 302 and 323 of the Indian Penal Code came to be registered on 18.12.2015 vide Crime No.75/2015 and investigation was undertaken. It is to be noted that the inquest panchnama was got executed and the dead body was sent for postmortem. After the postmortem was over, the panchnama of the clothes on the person of the deceased was got executed. Panchnama of the spot was also got executed. Accused came to be arrested. He was got medically examined. Statements of the witnesses were recorded. During the course of the investigation the accused gave memorandum and discovered dengara, which came to be seized under panchnama. The Postmortem Notes as well as Medico Legal Certificate of injured Rakesh was collected and after the investigation was over charge sheet was filed.

4 After the committal of the case learned Additional Sessions Judge, Shahada has framed charge at Exh.5. Prosecution has examined in all 10 witnesses to bring home the guilt of the accused, when accused had pleaded not guilty. After considering the evidence on record and hearing both sides, learned trial Judge convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer rigorous imprisonment for one month. The appellant was further held guilty of committing offence punishable under

Section 323 of the Indian Penal Code and was sentenced to suffer simple imprisonment for one month and to pay fine of Rs.500/- (Rupees Five Hundred only), in default to suffer simple imprisonment for 15 days. Set off has been granted under Section 428 of the Code of Criminal Procedure as the appellant is in jail since 18.12.2015. The said conviction is challenged in this appeal under Section 374 of the Code of Criminal Procedure.

5 Heard learned Advocate Mr. Joydeep Chatterji for the appellant and learned APP Mr. S.D. Ghayal for the respondent.

6 The learned Advocate for the appellant has submitted that the learned trial Judge has not appreciated the evidence properly. The major contradictions and omissions have not been considered as well as the situation of the spot and the distance between the house of Chinkibai and Vilabai. The distance between the two houses is in fact, much in view of the fact that those are situated on two different hills and there is a Nala in between the two hills. It was impossible for PW 5 Chinkibai to go in such a high speed to the house of Vilabai to explain anything. Further, if we consider the testimony of PW 5 Chinkibai, she has not stated anything in respect of presence of Rakesh and alleged sustaining of injuries by Rakesh. PW 3 Vilabai – informant was admittedly not present and it is stated that she relied on whatever was conveyed by Chinkibai to her. If Rakesh was not at

all present at the spot, taking into consideration the examination-in-chief of PW 5 Chinkibai, it could not have been reflected in First Information Report Exh.28 and there could not have been even a charge for the offence under Section 323 of the Indian Penal Code. Prosecution has examined PW 6 Rakesh, who says that he was in front of the house of Chinkibai when he was allegedly assaulted by accused with fists and hand. Though he had stated that he had sustained injury to his neck, he has improved his version in his cross-examination by saying that the said injury was bleeding injury, but it does not find any support in the testimony of PW 10 Dr. Satpute, who had examined him. According to PW 6 Rakesh, after he was assaulted by accused, accused went inside the house of Chinkibai and assaulted Sukalal, who was sleeping there. PW 6 Rakesh does not say that in any way he had tried to save his brother. PW 6 Rakesh rather says that accused has tried to assault PW 5 Chinkibai and then Chinkibai had driven him out of her house. However, PW 5 Chinkibai does not say so. She rather says that she had tried to stop accused from assaulting Sukalal. Trying to stop a person from assaulting another is different from the person assaulting such intervener. Prosecution has examined PW 8 Molabai, who is the mother-in-law of PW 5 Chinkibai and paternal aunt of deceased. According to PW 8 Molabai, after PW 6 Rakesh was assaulted by accused, he left the spot. If this is to be taken as it is, then how PW 6 Rakesh can be taken as an eye witness to the incident

of assault by accused to Sukalal. Therefore, the testimony of all these three alleged eye witnesses does not stand corroborated to each other. Further, it does not stand corroborated to the testimony of PW 7 Dr. Udesingh Pawara, who has conducted the autopsy. In the cross-examination PW 7 Dr. Pawara has admitted that the injuries noted by him on the person of Sukalal were possible if a person falls in the valley, so also on rough surface. He has admitted that there are no injuries on the occipital and temporal lobe of the deceased. He has not mentioned the age and colour of injuries noted in the column Nos.17 and 18 of the Postmortem Report. He has further stated that the bleeding injury was fresh injury, which might have occurred 3-4 hours prior to the death. In categorical terms he has admitted that death of Sukalal might have been caused around 5.00 to 6.00 a.m. of 18.12.2015, which is not the prosecution case. Therefore, the medical evidence is not supporting the prosecution story. PW 1 Prashant is the spot panch as well as PW 4 Ganesh. There are contradictions between their testimonies. Further, the situation of the house of PW 5 Chinkibai has come on record through the spot panchnama Exh.17, PW 1 Prashant, PW 4 Ganesh, PW 5 Chinkibai and PW 8 Molabai. Her house consists of two rooms; one is cattle shed and another is kitchen. Deceased was sleeping in cattle shed, whereas PW 5 Chinkibai was allegedly grinding on grinding stone. The said place is not visible from the cattle shed and vice versa. Therefore, it is hard to believe that Chinkibai

would have noticed that accused was assaulting Sukalal.

7 It has been further submitted on behalf of learned Advocate for the appellant that the motive behind the alleged murder has not been proved by the prosecution. According to PW 3 Vilabai, Rajubai – mother of present appellant working as Anganwadi Sevika was not even getting salary since one year prior to the First Information Report as she was not attending the meetings. The accused and his brother had suspicion that Vilabai was behind the stoppage of salary of their mother. Though PW 3 Vilabai had stated that accused and his brother were abusing and threatening her as well as Sukalal, they were not paying attention. However, to support her contention there is absolutely no evidence collected by the Investigating Officer as well as statements of the relevant persons were never recorded under Section 161 of the Code of Criminal Procedure. The question, therefore, arises that whether the accused could have been convicted in absence of proof of *mens rea*. The learned trial Judge has failed to consider all these things and, therefore, the conviction deserves to be set aside by allowing the appeal.

8 Per contra, the learned APP strongly supported the reasons given by the learned trial Judge while convicting the appellant. He submitted that all the panchnamas have been proved by examining the panch witnesses, PW 1 Prashant and PW 4 Ganesh are the panch to the spot panchnama Exh.17.

The situation at the spot has been brought on record. The spot was in the house of Lalsingh Padvi i.e. husband of PW 5 Chinkibai. PW 2 Sharad Shyamrao Borse is the panch to the video shooting of First Information Report and the seizure of pen drive, in which that video shooting was copied, inquest panchnama Exh.23 and seizure of clothes of deceased Exh.54. PW 4 Ganesh is also the panch to the memorandum and discovery panchnama Exhs.30 and 31, wherein the accused had discovered the murder weapon dengara from the shrubs. There is nothing in the cross of all these panch witnesses which could discard their testimony. Though PW 3 Vilabai is not an eye witness; yet, she has been examined to prove that accused had grudge in his mind as against deceased. It is not in dispute that mother of accused was serving as Anganwadi Sevika. PW 3 Vilabai as well as PW 6 Rakesh both have stated that the accused and his brother were annoyed with the fact that Rajubai's salary has been stopped about a year prior to the First Information Report. They were under impression that PW 3 Vilabai is behind the said act.

9 Learned APP further submitted that PW 5 Chinkibai, PW 6 Rakesh and PW 8 Molabai are the eye witnesses. PW 6 Rakesh is in fact injured also. Though in the substantive evidence PW 5 Chinkibai has not disclosed the injuries to PW 6 Rakesh, she was firm in saying the assault to Sukalal by accused with dengara, when Sukalal was sleeping in her house.

Further, Rakesh was assaulted outside her house and the said place may not be visible from her where she was grinding. That does not mean that she was not able to see what took place inside her house. The testimony of PW 6 Rakesh stood supported by PW 10 Dr. Kantrao Dhondiba Satpute, who had examined Rakesh around 11.00 a.m. on 18.12.2015. It was the simple injury which was sustained by Rakesh. Thus, the ingredients of Section 323 of the Indian Penal Code were proved. PW 8 Molabai says that PW 6 Rakesh was assaulted by accused, but then she says that he left the spot. Though it might appear that there is no corroboration between PW 6 Rakesh and PW 8 Molabai in respect of the fact that Rakesh witnessed the assault by accused to deceased; yet, they both stood corroborated to the fact that accused had assaulted PW 6 Rakesh. Then PW 5 Chinkibai's testimony stood supported by PW 8 Molabai in respect of assault by accused to Sukalal. Therefore, we cannot discard the testimony of three witnesses. PW 7 Dr. Udesingh Pawara has stated that injuries caused to Sukalal narrated in column No.17 resulted in his death. Prosecution has proved that death of Sukalal was homicidal in nature. PW 9 Ramkrushna Khairnar is the Investigating Officer. On the basis of the evidence that was led by the prosecution; the learned trial Judge has rightly convicted the appellant. There is no merit in the appeal, it deserves to be dismissed.

10 To begin with we would like to start the discussion with the testimony of PW 3 Vilabai, the informant. She is admittedly not present when the alleged incident took place in the house of PW 5 Chinkibai, however, she was firm in saying that when Sukalal left her house around 9.30 a.m. on 17.12.2015 he had told that he was proceeding for the pooja of Waghdev at Keli and he would go to the house of Chinkibai. In the cross of PW 6 Rakesh it has come on record that the pooja of Waghdev was performed in front of the house of Chinkibai. Chinkibai was the cousin sister of deceased Sukalal and, therefore, it was obvious for Sukalal to go to the house of Chinkibai. We would consider the point of motive at a later point of time, but what could be gathered further from the testimony of PW 3 Vilabai is that the temple of Waghdev is on one hill and the house of accused is on the another hill. This situation may not help the accused when admittedly on 17.12.2015 there was admittedly the said pooja and it has come further on record that villagers gathered for the said pooja, which starts with traditional dance. In the cross, it has been rather extracted from PW 3 Vilabai that they had reached Dhadgaon with Sukalal around 7.00 p.m. and thereafter around 7.30 p.m. she was at Police Station, Dhadgaon. It was then tried to be brought on record that the First Information Report ought to have been on 17.12.2015, whereas it appears that it has been registered around 2.55 a.m. on 18.12.2015. We do not find that there is any delay in lodging the report,

taking into consideration the distances and the situation.

11 PW 5 Chinkibai is the main eye witness in whose house the incident has taken place. She had stated that around 4.00 p.m. the incident took place. She was grinding grains on the grinding stone and Sukalal had slept in the house. Accused came in her house and assaulted Sukalal on his head. She has identified the weapon before the Court. In the cross-examination it has been brought on record that the Primary Health Centre is at a distance of five minutes from her house, but it is not the case of these witnesses nor it was suggested as to why Sukalal was not taken to Primary Health Centre. It was tried to be brought on record that the place where Sukalal had slept in the cattle shed was not visible from the kitchen where the grinding stone has been installed. However, this witness has denied a suggestion that after Sukalal shouted she went to the spot. It is rather extracted in her cross-examination that accused had given first blow on the left side of the head of Sukalal. This fact was rather not told by her in her examination-in-chief. When it has been extracted in her cross, now, it does not lie in the mouth of the accused that she is not an eye witness. We have not found any such fact in the cross-examination of this witness to discard her testimony. Rather the suggestions and extraction has confirmed that she has witnessed the assault by the accused with dengara seized in the matter

on the head of Sukalal.

12 PW 6 Rakesh is the injured eye witness and brother of deceased. He has stated that he was in front of the house of Chinkibai, when accused came and held his neck and then beaten him on his back by fist blows. The only improvement he has made that he has pushed accused and rescued himself. He then says that accused then entered the house of Chinkibai and assaulted Sukalal, who was sleeping. At this stage itself we are taking note of the examination-in-chief of PW 8 Molabai, wherein she has stated that after accused has assaulted PW 6 Rakesh, Rakesh has left the spot. Conduct of PW 6 Rakesh after the alleged assault on him is rather not convincing. At the most, it can be said that he would have been seen accused entering the house of Chinkibai. PW 6 Rakesh does not say that he followed accused to see what he is doing. It is rather impossible for a person to stand outside the house and then see what is going on inside the house. To say about what was going on inside the house, the position of that person outside the house should have been clearly stated. Further, if he was witnessing that accused was assaulting deceased, then why he has not raised hue and cry and tried to rescue his brother. PW 6 Rakesh does not say that after he allegedly saw accused beating Sukalal he had caught hold of the accused and raised his voice, so that neighbouring persons can gather. Therefore, the testimony of

PW 6 as eye witness to the assault on Sukalal is not believable. Most probably as stated by PW 8 Molabai he left the spot after the accused assaulted him. He has then been examined by PW 10 Dr. Satpute on the next day. PW 3 Vilabai is also not saying that when she went to the spot PW 6 Rakesh was present and he also narrated to her what he had seen. In cross PW 6 Rakesh had said that he was standing in front of the door of the house of Chinkibai and then went on to exaggerate that he had sustained bleeding injury to the neck and the collar of his shirt had stained with blood. There is no support to the said statement. Therefore, his testimony is to be believed only to the extent of simple injuries to him.

13 PW 8 Molabai has stated that she saw Rakesh beaten by accused, who had come from back side of Rakesh and thereafter accused entering the house of Chinkibai. She says that when Chinkibai made hue and cry, she rushed in the house of Chinkibai. She also tried to say that as accused had killed Sukalal, Chinkibai went to inform Sukalal's father. After she had entered the house of Chinkibai, she had told to accused not to assault Sukalal and had caught hold of the hand of accused and drove him out of the house. It appears that her entry inside the house was after Chinkibai left the house, but then by that time still the accused was inside the house of Chinkibai. PW 5 Chinkibai has not given the presence of PW 8 Molabai. But from the cross-

examination of PW 8 Molabai we could not see any reason for disbelieving her and when she had no reason to implicate, it can be certainly said that she has witnessed part of the incident. We cannot discard the testimony of these three eye witnesses only on the ground that they are the relatives of deceased. The presence of these witnesses at the spot of incident or around the spot of incident was but natural.

14 Now, turning towards the testimony of PW 7 Dr. Pawara, who had conducted the autopsy, it is to be noted that the dead body was handed over to him around 10.25 a.m. on 18.12.2015 for postmortem. The postmortem has been conducted between 10.35 a.m. to 11.45 a.m. He has found following external injuries and there were corresponding internal injuries.

- i) Contused Lacerated Wound over left side of parietal region of head having size 3 x 2 x 1 c.ms. The bleeding was present.
- ii) Linear fracture of left parietal bone.
- iii) Brain was congested and hemorrhagic.

He has stated that the death was caused within 6-8 hours of taking meal and the probable cause of death was head injury. Police Officer had sent him the wooden dengara and after inspecting the same he has given the opinion that injuries noted by him in column No.17 are possible by the said weapon. Now, some confusion has been created by him in his cross-

examination. The first suggestion which he has admitted is that the injuries noted by him in the report are possible due to fall of a person in the valley, so also on rough surface. Accused cannot make use of this admission, for the simple reason that there was absolutely no suggestion to PW 3 Vilabai, PW 5 Chinkibai, PW 6 Rakesh and PW 8 Molabai. Furthermore, he has stated that Sukalal's death might have been caused around 5.00 to 6.00 a.m. of 18.12.2015. It is to be noted again that no such suggestion has been given to the above said witnesses in the cross. Rather suggestions given to PW 3 Vilabai in the cross which she has admitted also would show that when Sukalal was taken to Dhadgaon hospital around 7.00 p.m., he was declared dead. The purpose of cross-examination is to extract the truth and not to extract admission by putting the witness in the confusion. The basic nature of medical evidence is supportive/corroborative in nature. It is the well settled position of law that when there is contradiction between the ocular evidence and the medical evidence, then, the ocular evidence would prevail. Of course, in such situation the medical evidence if strong, then the said contradiction may give benefit to the accused. But, here, in this case, there is no contradiction as regards the assault, the weapon used and the head injury that has been caused. Therefore, the alleged admissions given by PW 7 Dr. Pawara cannot be used to give benefit to the appellant.

15 PW 4 Ganesh Koli has given the details as to what memorandum was given by the accused and how he has led to the discovery of dengara. It has been discovered from the shrubs and, therefore, he together with testimony of PW 9 Ramkrushna Khairnar - Investigating Officer has proved the discovery under Section 27 of the Indian Evidence Act. The other panchanamas have also been duly proved. There is nothing in the cross-examination of the panch witnesses which would discard their testimony.

16 Thus, from the re-appreciation and revisiting the evidence that was adduced by the prosecution we hold that the prosecution proved that death of Sukalal was homicidal in nature and accused is the author of the crime. Now, turning towards the motive the perception of PW 3 Vilabai was sufficient and further, when there is direct evidence in the nature of eye witness, motive may not be of much importance. We, therefore, come to the conclusion that prosecution has proved that the accused has committed offence punishable under Section 302 and 323 of the Indian Penal Code. The conviction of the appellant is perfectly, justifiable and legal. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, the Criminal Appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

agd